IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 906

WALTER SCOTT WATSON, *Petitioner*,

vs.

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY,
a Corporation, *Respondent*.

No. 907

KENNETH NICOLL WATSON, *Petitioner*,

vs.

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY,
a Corporation, *Respondent*.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

SETH W. RICHARDSON
ALFONS B. LANDA
RAYMOND C. CUSHWA
WARREN E. MAGEE
Washington, D. C.
Attorneys for Petitioners

Of Counsel:
DAVIES, RICHBERG, BEEBE,
BUSICK & RICHARDSON
MAGEE, BEEDY & MCGOVERN
Washington, D. C.

PRESS OF JUDD & DETWEILER, INC., WASHINGTON, D. C.

INDEX.

	Page
Petition for writs of certiorari	1
The opinions below	2
Jurisdiction	2
Summary statement	2
Questions presented	7
Assignment of errors relied upon	8
Reasons for granting the writ	8
I. The Court of Appeals has decided a question of general importance, which has not been, but should be settled by this Court	9
II. The Court of Appeals has rendered a decision in conflict with five decisions of other Circuit Courts of Appeal on the same matter	12
III. The Court of Appeals' decision has not given proper effect to and conflicts with the applicable decisions of this Court	18
Conclusion	23

TABLE OF CASES CITED.

Alabama Life Insurance Company v. *Garmany*, 74 Ga. 51	11
American Life Insurance Co. v. *McAden*, 109 Pa. 399	11
Ballou et al. v. *Billings*, 136 Mass. 307	11
Bituminous Casualty Exchange v. *Ford Elkhorn Coal Co.*, 48 S. W. 2d 1057 (Ky.)	11
Black v. *Supreme Council, American Legion of Honor*, 120 F. 580	15
Brough v. *Presidential Fire & Marine Ins. Co.*, 176 So. 895 (La.)	11
Central Trust Co. v. *Chicago Auditorium*, 240 U. S. 581	22
Davies v. *Sun Life Assur. Co.*, 2 F. Supp. 955	16
Eminent Household of Columbian Woodmen v. *Bryant*, 200 S. E. 321 (Ga.)	11
Erwin v. *World Mut. Health & Accident Ins. Co.*, 186 Atl. 260 (Pa.)	11
Grisby v. *Russell*, 222 U. S. 149	3
Harwood v. *Security Mut. Life Ins. Co.*, 161 N. E. 589 (Mass.)	11
Industrial Life & Health Ins. Co. v. *Thomas*, 159 S. E. 885 (Ga.)	11
Life & Casualty Ins. Co. v. Baker, 79 S. W. 2d 36 (Tenn.)	11
Life & Casualty Ins. Co. v. *Womack*, 3 S. E. 2d 791 (Ga.)	11
McKee v. *Phoenix Insurance Co.*, 28 Mo. 383	11
Michaelson v. *Security Mut. Life Ins. Co.*, 154 F. 356, cert. den. 207 U. S. 588.	15
Mobley v. *N. Y. Life Ins. Co.*, 295 U. S. 632	10,11,16,17,18
Mutual Relief Ass'n. v. *Ray*, 292 S. W. 396 (Ark.)	11
National Life & Accident Ins. Co. v. *Hamilton*, 98 S. W. 2d 107 (Tenn.)	11
New York Life Ins. Co. v. *Statham*, 93 U. S. 24	21
N. Y. Life Ins. Co. v. *Viglas*, 297 U. S. 672	10,11,16,18,22,23
Pierce v. *Liberty Life Ins. Co.*, 242 Pac. 133 (Kan.)	11
Rochm v. *Horst*, 178 U. S. 1	22
Security Life Ins. Co. v. *Matthews*, 12 S. W. 2d 865	11
Smith v. *Richards*, 13 Pet. 26, 38 U. S. 26	12
Supreme Council A. L. H. v. *Black*, 123 F. 650, cert. den. 191 U. S. 568	13
Supreme Council, A. L. H. v. *Daix*, 130 F. 101	15
Thompson v. *New York Life Ins. Co.*, 28 Pac. 628, 21 Or. 466	11
Union Central Life Insurance Co. v. *Pottkor*, 33 Ohio 459, 31 Am. Rep. 555	11
Van Werden v. *Equitable Life Assur. Society*, 68 N. W. 892 (Iowa)	11
Williamson v. *Mutual Benefit Health and Accident Ass'n.*, 100 F. 2d 264	15

STATUTE.

Section 240 of the Judicial Code as amended by the Act of February 13, 1925	2

MISCELLANEOUS.

Vol. 7, Couch on Insurance, Section 1870	16

In The

Supreme Court of the United States

October Term, 1943

No.

Walter Scott Watson, *Petitioner,*

vs.

Massachusetts Mutual Life Insurance Company,
a Corporation, *Respondent.*

No.

Kenneth Nicoll Watson, *Petitioner,*

vs.

Massachusetts Mutual Life Insurance Company,
a Corporation, *Respondent.*

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

Petitioners, Walter Scott Watson and Kenneth Nicoll Watson, respectfully pray for Writs of Certiorari to review the decision (R. 25-30) and judgments (R. 31) of the United States Court of Appeals for the District of Columbia, entered on December 20, 1943, on rehearing, affirming the

judgments (R. 5, 13) of the District Court of the United States for the District of Columbia, sustaining motions of respondent, an insurance corporation, to dismiss the petitioners' respective complaints for recission and return of certain premiums of insurance.

THE OPINIONS BELOW

The District Court filed no opinion when it dismissed petitioners' complaints. The first opinion (R. 18) of the Court of Appeals was entered June 30, 1943, and is not yet reported. The second opinion (R. 25-30) of the Court of Appeals, on rehearing, was entered on December 20, 1943, and is not yet reported.

JURISDICTION

The final decision and judgments of the Court of Appeals were entered on December 20, 1944 (R. 25-30, 31-32). This Court, for good cause shown, on March 20, 1944 granted petitioners to and including April 19, 1944 within which to file this petition for certiorari (R. 35). The jurisdiction of this Court is invoked under Section 240 of the Judicial Code as amended by the Act of February 13, 1925.

SUMMARY STATEMENT

This case presents for correction errors of the District Court of the United States for the District of Columbia, erroneously affirmed by the United States Court of Appeals for the District of Columbia.

The case comes up on motions to dismiss petitioners' complaints; therefore, all of the facts alleged in petitioners' complaints are conceded.

Petitioners each filed a complaint in the District Court against respondent corporation, a Massachusetts insurance company doing a life insurance business in the District of

Columbia (R. 1-4, 9-12). The facts alleged in each complaint are identical, except for the amounts of premiums paid (R. 3, 11), and are as follows:

Petitioners were desirous of obtaining policies of life insurance on the life of one William E. Richardson, who was indebted to the petitioners (R. 2, 10). Richardson was agreeable to the issuance of such policies, but took no part in the negotiations for such insurance (R. 2, 10). Those negotiations were carried on by petitioners and respondent insurance corporation (R. 2, 10).

Petitioners requested of respondent insurance corporation absolute life insurance policies on Richardson's life, naming petitioners irrevocably as beneficiaries (R. 2, 10). Petitioners were willing and offered to pay all the premiums of such insurance (R. 2, 10).[1] Respondent corporation refused to issue the requested policies, *but represented to petitioners that respondent corporation would issue a policy of life insurance in each instance, payable to the estate of Richardson, and would accept from Richardson absolute assignments of such policies to petitioners, thereby making petitioners the sole owners of all right, title and interest in and to the policies and thereby accomplishing the same results as would have been created had the policies named the petitioners as beneficiaries* (R. 2, 10).

Petitioners *believed* respondent's representations and *in reliance* upon them obtained policies on the life of Richardson, payable to his estate, and shortly after their issuance Richardson absolutely assigned, under seal, to the petitioners, for value received, all right, title and interest in and to these policies (on an "Absolute Assignment" form supplied by respondent) respectively (R. 2-3, 10-11).

---

[1] Life insurance by a creditor, taken out on a debtor's life, is valid and can continue in full force and effect after the debt is paid. *Grisby* v. *Russell*, 222 U. S. 149.

Those absolute assignments were filed with and accepted by respondent (R. 3, 11).

Petitioners received from respondent corporation the assigned policies, received all notices thereunder and paid all premiums thereon. In fact, the insured Richardson never participated in the negotiations and never had the policies in his possession (R. 3, 11).

In reliance upon respondent's representations that petitioners were the absolute owners of such policies, just as if named originally as beneficiaries, petitioners paid $1,871.10 and $1,940.40, respectively, to respondent as premiums (R. 3, 11).

Thereafter, respondent advised petitioners that respondent *never considered petitioners to be the owners of those policies of insurance, and that petitioners never had absolute assignments of the policies because respondent always considered such assignments as collateral only* (R. 3, 11).

As respondent's position now is that, notwithstanding its agreement to the contrary, it *never* recognized such assignments, that complete and final repudiation relates back to the inception of the contract and is a breach *ab initio* (R. 3, 11).

Petitioners, having bargained with respondent corporation for life insurance policies over which they had *absolute control as the owners thereof*, and, as respondent *had agreed to so contract* with the petitioners, such repudiation by respondent was a willful and complete breach of that contract before the time of performance (R. 3-4, 11-12).

On such repudiation and breach altogether by respondent, petitioners elected to consider their policies rescinded and demanded the return of the premiums paid by them to respondent (R. 4, 12).

Respondent refused to return the premiums paid and petitioners instituted actions below, alleging the foregoing

facts, to recover such premiums and interest (R. 1-4, 9-12).

Respondent corporation moved to dismiss each of petitioners' complaints on the single ground, i. e. "failure to state a claim" (R. 4, 13).

The District Court granted respondent's motions to dismiss and dismissed petitioners' complaints (R. 5, 13). That court filed no opinion with the orders of dismissal.

Appeals were duly perfected by petitioners to the United States Court of Appeals from the orders of dismissal of the District Court (R. 6, 7; 14, 15). Those appeals were consolidated in the Court of Appeals (R. 17).

On June 30, 1943, the Court of Appeals, in a "Per Curiam" opinion, affirmed the District Court on the theory that the complaints did not show that the misrepresentations of respondent were material to the insurance protection for which petitioners paid premiums. No authorities were cited to support the court's decision (R. 18).

Petitioners duly filed a petition for rehearing in the court below (R. 19-22), pointing out that, under respondent's wilful repudiation and wrongful relegation of petitioners' policies into a "collateral" status, payment of the debt owed by Richardson to petitioners would cause the policies to revert to Richardson's estate or lapse, notwithstanding that petitioners had paid all premiums for the express purpose of buying absolute life insurance policies with the principal amounts thereof absolutely payable to petitioners on Richardson's death. Therefore, petitioners showed it was error for the court below to argue that petitioners received some kind of "protection" not defined and *not bargained for, and because the value of undefined and unpurchased "protection" was not alleged*, sustain the dismissal of petitioners' complaints.

The court below, realizing that its first opinion was untenable, granted a rehearing (R. 23), a further argument

(R. 24) and on December 20, 1943 filed a second opinion (R. 25-30).

The opinion below, on rehearing, in effect, concedes that the premise of the first opinion was untenable. In so many words the court below on rehearing concluded that it would "follow the cases which permit a creditor's policy to be enforced independently of the debt which gives rise to his insurable interest" (R. 28).

Then the court below held that "The allegation that the insurance was taken out for the purpose of protecting existing indebtedness makes a prima facie case in favor of the validity of the contract" (R. 28).

"Therefore", the court below concluded "the allegation that the defendant refused to recognize the terms of the assignment to the plaintiff, which it had previously accepted, is sufficient to charge a breach of contract" (R. 28).

By an understatement of what the complaints alleged,[2] the court erroneously argued that the breach did not warrant a return of the premiums paid when petitioners elected to rescind, on the theory that life insurance "is a series of contingent obligations to pay if death occurs during the year covered by each successive premium" (R. 28-29).

---

[2] The court below says (R. 26) "Relying on defendant's representations that the assignment gave him the interest is purported to transfer, plaintiff paid * * * premiums during a period of years. After these premiums had been paid, defendant advised plaintiff it did not consider him the owner of the policy, that the assignment was not absolute but collateral only." But the complaints go further (Compare R. 2-3, R. 10-11). They allege, not only reliance upon respondent's representations that the assignments vested absolute ownership of the policies in petitioners, that petitioners paid premiums relying thereon, but state in Paragraphs 10 and 11 (R. 3-4, 11-12):

* * * * * * *

> 10. That defendant now advises plaintiff that they never considered plaintiff the owner of said policy and that plaintiff does not have, and never did have, an absolute assignment of said policy, but that defendant considers such assignment as a collateral assignment only;

While the court below conceded that petitioners could sue to recover damages for the breach, and *that the complaints did state causes of action for damages (R. 28), because petitioners had prayed for more damages than they could recover, the court below held the complaints were properly dismissed* (R. 30).

Petitioners sought another rehearing for manifest errors (R. 32) but their petition was denied, without opinion, on January 7, 1944 (R. 32).

On March 20, 1944, this Court, for good cause shown, granted petitioners to and including April 19, 1944 within which to file this petition for certiorari (R. 35).

QUESTIONS PRESENTED

(1) Where a party contracts for a policy of insurance on the life of a debtor, and obtains such a policy as the absolute owner by agreement with an insurance company under an absolute assignment from the debtor (furnished by the insurance company), pays premiums in reliance upon the company's representations that the assignment conferred absolute ownership to the creditor—assignee, and thereafter the insurance company repudiates its agreement and refuses to recognize the assignment as absolute and asserts

---

11. That the plaintiff bargained with the defendant for a policy over which he would have absolute control because of sole ownership thereof and that defendant agreed to so contract with the plaintiff and that defendant has breached its contract with the plaintiff by refusing to recognize plaintiff's full and complete ownership of said policy.

* * * * * * *

Such allegations allege an absolute and final repudiation of its contract by respondent, coupled with an allegation that respondent now states it *never* recognized petitioners' assignments. A more complete and final repudiation, as distinguished from a breach *not* involving *complete* repudiation, is difficult to comprehend. In effect, that repudiation because of its very completeness relates back and becomes a breach ab initio, warranting rescission by petitioners.

that it *never recognized the assignment*, except as "collateral" to secure the debt, may the other contracting party (the assignee) treat such a wilful and final repudiation as a breach of the contract altogether, rescind and recover the premiums paid?

(2) Do not such facts, involving a wilful and complete repudiation dating back to the inception of the contract, support a breach ab initio, rather than a present and partial breach, warranting a rescission by the guiltless party?

(3) Is a complaint for damages alleging such facts and praying for a judgment for the amount of premiums paid and interest, subject to dismissal for "failure to state a claim"?

ASSIGNMENT OF ERRORS RELIED UPON

The Court of Appeals erred:

(1) In affirming the judgments of the District Court sustaining respondent corporation's motions to dismiss petitioners' complaints, each for "failure to state a claim."

(2) In affirming the judgments of the District Court dismissing petitioners' complaints.

REASONS FOR GRANTING THE WRIT

Several of the reasons usually and generally considered by this Court as a basis for certiorari are present in this case.

I. The Court of Appeals has decided a question of general importance, which has not been, but should be, settled by this Court and has decided that important question contrary to the great weight of the authorities.

II. The Court of Appeals has rendered a decision in conflict with the five decisions of other Federal Circuit Courts of Appeal on the same matter.

III. The Court of Appeals' decision has not given proper effect to and conflicts with the applicable decisions of this Court.

I

THE COURT OF APPEALS HAS DECIDED A QUESTION OF GENERAL IMPORTANCE, WHICH HAS NOT BEEN, BUT SHOULD BE SETTLED BY THIS COURT

Petitioners each sought of respondent corporation an insurance policy on the life of their debtor, William E. Richardson. Respondent refused policies on Richardson's life payable to petitioners for reasons unknown to petitioners. *Instead,* respondent suggested that *the same result* could be obtained by having Richardson take out policies on his own life, make them payable to his estate, and for petitioners to take from Richardson absolute assignments of the policies.

Respondent represented that it would recognize those assignments as absolute, vesting full and absolute ownership in petitioners.

Relying upon respondent's representation that petitioners would be the absolute owners of such policies under such assignments, the policies were taken out and absolutely assigned by Richardson to petitioners.

Thereafter petitioners paid the premiums on such policies for about eight years, relying upon respondent's representations.

Respondent corporation thereafter repudiated its contract with petitioners and stated it *never* recognized the assignments as absolute,[3] and *always* considered such assignments as *collateral to secure the debt.* Petitioners treated this repudiation as an absolute and complete breach

[3] A more typical "tongue in the cheek" attitude by a wealthy insurance company defies one's imagination.

of contract, rescinded and sued for damages, i. e. the recovery of their premiums.

The Court of Appeals held that petitioners' complaints, alleging the foregoing facts, each failed to state a claim, because each "complaint discloses no facts which enables us to determine the excess of the premiums paid over the benefits received" (R. 30).

Thus, the Court of Appeals has decided, even though respondent advised petitioners that it *never* considered petitioners the owners of the policies, *that petitioners do not have* and *never* did have absolute assignments of the policies, and that respondent considers the assignments to petitioners as *collateral* only (R. 3, 11), that there was no anticipatory breach *or* breach altogether which would warrant a return of the premiums paid by petitioners, notwithstanding the payment of such premiums by petitioners *on the express understanding, agreement and representation of respondent that such assignments were absolute and would vest absolute ownership of the policies in question in the petitioners.*

In making that decision, the Court of Appeals has decided a question of general importance affecting millions of policy holders, which has not been, but should be, settled by this Court.

As this case involves an "unqualified refusal" to perform the original contract entered into between petitioners and respondent *or* a refusal "substantially to perform according to the terms of his (its) obligation," it falls in the field of law specifically left open as undecided, for future decision by this Court in the cases of *Mobley* v. *N. Y. Life Ins. Co.*, 295 U. S. 632, 638, 639 and *N. Y. Life Ins. Co.* v. *Viglas*, 297 U. S. 672, 678, 681.

But this Court has defined "an anticipatory breach" as "one committed before the time has come when there is a

present duty to perform" and "it is the outcome of words or acts evincing an intention to refuse performance in the future" (*New York Life Ins. Co.* v. *Viglas*, supra, p. 681) and we submit that the admitted facts here bring this case within such definition.

The questions here presented warrant certiorari, particularly when considered in connection with a conflict of decisions in the Federal courts, on the important subject of life insurance, in which millions of citizens and numerous insurance companies are interested.

Mobley v. *N. Y. Life Ins. Co.*, 295 U. S. 632, 633, 634.
N. Y. Life Ins. Co. v. *Viglas*, 297 U. S. 672, 676.

The erroneous holding that petitioners were not entitled to recover the premiums paid by them to respondent on respondent's absolute repudiation of the contract here involved, is contrary to the great weight of the authorities in this country.[4] As the questions here involved are of substance, and are of general importance, we submit that the public interest will be promoted by their prompt settlement in this Court.

---

[4] *Thompson* v. *New York Life Ins. Co.*, 28 Pac. 628, 634, 635, 21 Or. 466; *Ballou, et al.* v. *Billings*, 136 Mass. 307, 309; *Van Werden* v. *Equitable Life Assur. Society*, 68 N. W. 892, 895 (Iowa); *McKee* v. *Phoenix Insurance Co.*, 28 Mo. 383, 386; *Alabama Life Insurance Company* v. *Garmany*, 74 Ga. 51, 58, 59; *Union Central Life Insurance Co.* v. *Pottkor* 33 Ohio 459, 466, 467, 31 Am. Rep. 555; *Life & Casualty Ins. Co.* v. *Womack*, 3 S. E. 2nd 791, 793 (Ga.); *Eminent Household of Columbian Woodmen* v. *Bryant*, 200 S. E. 321, 324 (Ga.); *Life & Casualty Ins. Co.* v. *Baker*, 79 S. W. 2d 36, 37 (Tenn.); *National Life & Accident Ins. Co.* v. *Hamilton*, 98 S. W. 2d 107, 108 (Tenn.); *Mutual Relief Ass'n.* v. *Ray*, 292 S. W. 396, 402 (Ark.); *Security Life Ins. Co.* v. *Matthews*, 12 S. W. 2d 865, 866 (Ark.); *Pierce* v. *Liberty Life Ins. Co.*, 242 Pac. 133, 134 (Kan.); *Industrial Life & Health Ins. Co.* v. *Thomas*, 159 S. E. 885 (Ga.); *Bituminous Casualty Exchange* v. *Ford Elkhorn Coal Co.*, 48 S. W. 2d 1057, 1058 (Ky.); *American Life Insurance Co.* v. *McAden*, 109 Pa. 399, 404, 405; *Erwin* v. *World Mut. Health & Accident Ins. Co.*, 186 Atl. 260, 261 (Pa.); *Harwood* v. *Security Mut. Life Ins. Co.*, 161 N. E. 589, 592 (Mass.); *Brough* v. *Presidential Fire & Marine Ins. Co.*, 176 So. 895, 899 (La.).

II

THE COURT OF APPEALS HAS RENDERED A DECISION IN CONFLICT WITH FIVE DECISIONS OF OTHER CIRCUIT COURTS OF APPEAL ON THE SAME MATTER

In this case, petitioners sought an arrangement with respondent under which petitioners would become the absolute owners of life insurance policies on their debtor, Richardson. On the express representation of the respondent that it would recognize an absolute assignment to petitioners of such life insurance policies, if taken out by Richardson and payable to his estate, petitioners had Richardson apply for such policies and thereafter, on an absolute assignment form supplied by respondent, had Richardson absolutely assign the policies to petitioners. In reliance upon the express agreement existing with respect to this arrangement, vesting petitioners with absolute ownership of the policies, petitioners paid premiums for over eight years.

Then respondent advised petitioners that it *never* recognized the original arrangement as vesting ownership of the policies in petitioners and that it did not now and would never recognize such ownership.[5] On the occasion of this repudiation and renunciation, respondent took the position that the real owner of the policies was Richardson or his estate, as the policies were collateral only, to secure petitioners' debts. We say such facts constitute a renunciation of the original agreement, an absolute repudiation, or a breach altogether of that agreement by respondent. On such facts, the court below refused to treat the action of the respondent as an intention to refuse to perform the original agreement or a complete repudiation of that agreement, and ruled that petitioners could not recover back the premiums

---

[5] Such a final statement repudiating the contract ab initio should be in law and effect the same as a misrepresentation of a material fact, which would preclude a "meeting of the minds," and would afford petitioners the right of rescission. *Smith* v. *Richards,* 13 Pet. 26, 38 U. S. 26.

paid. That conclusion conflicts with five other decisions in the Circuit Courts of Appeal, which we will now consider.

In treating a similar refusal on the part of an insurance company as a renunciation of a policy of insurance, the Court of Appeals for the Third Circuit in the case of *Supreme Council A. L. H.* v. *Black*, 123 F. 650, cert. den. 191 U. S. 568, held (pp. 652, 653):

> In *Rochm* v. *Horst*, 178 U. S. 1, 13, 20 Sup. Ct. 780, 44 L. Ed. 953, the Supreme Court of the United States, upon a review of the cases, American and English, relating to anticipatory breaches of an executory contract by a refusal on the part of one party to it to perform it, approved as reasonable the rule laid down in *Hochster* v. *De La Tour*, 2 El. & Bl. 678, namely, that a party to an executory agreement may, before the time for executing it, break the agreement either by disabling himself from fulfilling it or by renouncing the contract, and that an action will lie for such breach before the time for the fulfillment of the agreement. In delivering the opinion of the Supreme Court, Chief Justice Fuller quoted with approval what was said in *Johnstone* v. *Milling*, L. R. 16 Q. B. Div. 460, 467, by Lord Esher, Master of the Rolls, who put the principle thus:
>
> > When one party assumes to renounce the contract, that is, by anticipation refuses to perform it, he thereby, so far as he is concerned, declares his intention then and there to rescind the contract. Such a renunciation does not of course amount to a rescission of the contract because one party to a contract cannot by himself rescind it; but by wrongfully making such a renunciation of the contract he entitles the other party, if he pleases, to agree to the contract being put an end to, subject to the retention by him of his right to bring an action in respect of such wrongful rescission. The other party may adopt such renunciation of the contract by so acting upon it as to declare that he too treats the contract as at an end, except for the

> purpose of bringing an action upon it for the damages sustained by him in consequence of such renunciation.

We see no reason why this principle is not applicable to the present case. The renunciation by the defendant of its insurance contract was most clearly manifested, first, by the adoption of the amended by-law, and then by its subsequent course of conduct in putting the amended by-law into effect and undertaking to reduce Black's insurance. To escape the consequences of its deliberate and unequivocal repudiation of the contract, the defendant, when sued by Black, cannot be heard to assert its inability to annul the contract. *Rochm* v. *Horst,* supra; *Moorhead* v. *Fry,* 24 Pa. 37. In the latter case the court said:

> It will not do to aver the inability of Nelson to set aside the contract as a reason why the attempt to do so will not authorize Fry to treat it as rescinded and recover for his labor upon a quantum meruit.

In *Ballou et al* v. *Billings,* 136 Mass. 307, 309, it was held that if one party to a contract, which has been partly performed by payment of money by the other party, totally repudiates it when the other party is not in default, the latter may rescind the contract, and maintain an action to recover back the money paid by him. The court there pointed out that the defendants derived their right to keep the money only from the contract which they had repudiated, and added:

> Rescission, or avoidance properly so called, annihilates the contract, and puts the parties in the same position as if it had never existed.

The defendant in the case before us having wrongfully renounced its contract, we think that, upon principle as well as upon authority, Black had the option to treat the contract as rescinded, and the right to sue immediately to recover back the moneys he had paid on the faith of the contract.

* * * * * * *

> According to the clear weight of authority, if an insurance company wrongfully cancels a policy, or otherwise wrongfuly renounces the contract, the insured may, at his election, treat the contract as rescinded, and recover back all the premiums he has paid. *Braswell* v. *The American Life Insurance Co.*, 75 N. C. 8; *McKee* v. *Phoenix Life Insurance Co.*, 28 Mo. 383, 75 Am. Dec. 129; *McCall* v. *Same*, 9 W. Va. 237, 27 Am. Rep. 558; *True* v. *Bankers' Life Association*, 78 Wis. 267, 47 N. W. 520; *Van Werden* v. *Assurance Society*, 78 Wis. 267, 47 N. W. 520; *Van Werden* v. *Assurance Society*, 99 Iowa, 621, 68 N. W. 892; *The Union Central Life Insurance Co.* v. *Pottkor*, 33 Ohio, 459, 466, 31 Am. Rep. 555.

To the same effect is an earlier and two later decisions of the Third Circuit Court of Appeals:

> *Black* v. *Supreme Council, American Legion of Honor*, 120 F. 580,
> *Supreme Council, A. L. H.* v. *Daix*, 130 F. 101,
> *Michaelsen* v. *Security Mut. Life Ins. Co.*, 154 F. 356, cert. den. 207 U. S. 588.

In the recent case of *Williamson* v. *Mutual Benefit Health and Accident Ass'n.*, 100 F. 2d 264, the Court of Appeals for the Fifth Circuit held that a refusal to perform a contract "in any event," by an insurance company, gave a good cause of action for anticipatory breach, authorizing the recovery of the entire amount caused by the breach. Accordingly, the Circuit Court reversed the action of the District Court in dismissing the complaint there involved, stating the applicable rule to be (p. 264):

> It is the law that where there is a repudiation of the contract, one may sue for an anticipatory breach of the same, and recover, if he can, the entire amount for said breach in one lump sum. Therefore, the question presented by this appeal is whether or not appellant's

petition states a cause of action for anticipatory breach of the contract.

In the *Williamson* case, it was vigorously argued (see dissenting opinion) that the case was controlled by this Court's decisions in the cases of *Mobley* v. *N. Y. Life Ins. Co.*, 295 U. S. 632 and *N. Y. Life Ins. Co.* v. *Viglas*, 297 U. S. 672, but the Fifth Circuit Court of Appeals took the view that those cases were not controlling because the *Williamson* case involved an anticipatory breach, which is in the field of law, we submit, that this Court specifically left open for future decision in both the *Mobley* and *Viglas* decisions.

The decision below conflicts with the foregoing decisions in the Third and Fifth Circuit Courts of Appeal.

Moreover the decision below also conflicts with what is generally considered to be the *majority rule*, in this country and England, which is that "the insured may recover as damages the amount of premiums paid or premiums and interest, where there has been a wrongful repudiation of the contract by the insurer, and the insured has elected to rescind the contract rather than have it enforced".[6]

An exhausive review of the authorities on this point was made by District Judge Cushman in the case of *Davies* v. *Sun Life Assur. Co.*, 2 F. Supp. 955, and in the course of the opinion the District Court pointed out (pp. 957, 958):

> Although there is no doubt that the wrongful refusal of an insurance company to carry out its contract of insurance gives a right of action to the injured party for the damages sustained by reason of such breach or repudiation of the contract, there does seem to be an irreconcilable conflict of authority as to the amount of recovery, or measure of damages, for the wrongful cancelation, repudiation, or termination of the contract of insurance by the insurer. In fact, there are well estab-

[6] Vol. 7, Couch on Insurance, Section 1870.

lished rules or lines of authority which are in direct conflict, as well as divers variations from such rules. Under the rule, which is sometimes spoken of as the majority rule, the insured may recover as damages the amount of premiums paid, or premiums and interest, where there has been a wrongful repudiation of the contract by the insurer, and the insured has elected to rescind the contract, rather than have it enforced. Support for this rule is found in those cases which hold that the insured may recover premiums and interest without deduction for the risk while carried, as well as in those which permit a recovery of premiums and interest, without considering a deduction for the benefit derived by the insured during the time that the policy was in force; also, in those cases which have held that the insured was entitled to recover the amount paid, without deduction, and in which it is uncertain whether interest was included, (cited to support the text: *Henderson* v. *Supreme Council, A. L. H.* (C. C.) 120 F. 585; *Supreme Council, A. L. H.* v. *Black*, 59 C. C. A. 414, 123 F. 650, affirming (C. C.) 120 F. 580, certiorari denied in 191 U. S. 568, 48 L. Ed. 305, 24 S. Ct. 841) and in those which, without considering the question of deduction for the risk carried, have reached a similar conclusion. (cited to support the text: *Michaelsen* v. *Security M. L. Ins. Co.*, 83 C. C. A. 334, 154 F. 356, 12 Ann. Cas. 37, writ of certiorari denied in 207 U. S. 588, 52 L. Ed. 353, 28 S. Ct. 255). It has been said that the rule which denies deduction on account of intermediate benefits derived from the protection had during the existence of the policy rests upon the well-established principle that a party to an entire contract, who has partially performed it, cannot, upon subsequently abandoning it without fault upon the part of the other party, or his consent thereto, receive credit for the part performed.

The conflict here involved concerns a question of first importance that has not been but should be settled promptly by this Court in the public interest.

Mobley v. *N. Y. Life Ins. Co.*, 295 U. S. 632, 633, 634.

III

THE COURT OF APPEAL'S DECISION HAS NOT GIVEN PROPER EFFECT TO AND CONFLICTS WITH THE APPLICABLE DECISIONS OF THIS COURT

We submit that this case involves a complete repudiation and breach of the agreement entered into between petitioners and respondent and that that breach dates back, in effect, to the inception of the contract. Respondent has taken the position that it *never* recognized the original agreement and that it at the time of the repudiation *did not* and *would not* recognize the original agreement, coupled with a flat refusal to recognize petitioners, under the assignments here involved, as the absolute owners of the Richardson policies.

In such a situation, we say the court below erred in sustaining the dismissal of petitioners' complaints for damages. In reaching that erroneous decision, we submit that the court below misconstrued this Court's opinions in the cases of *Mobley* v. *N. Y. Life Ins. Co.*, 295 U. S. 632 and *N. Y. Life Ins. Co.* v. *Viglas*, 297 U. S. 672, when it concluded that those cases rendered it unnecessary "to consider the doctrine of anticipatory breach" (R. 28).

We say that the facts in this case clearly involve a repudiation by respondent and the refusal on the part of respondent to recognize the contract existing between petitioners and respondent. As that repudiation occurred before the time for performance, it was clearly an anticipatory breach or of such character in finality as would warrant petitioners in treating the contract as absolutely and finally broken, authorized rescinding of the same and the recovery of the petitioners' damages, which, in such a situation, would be at the very least the premiums paid by petitioners, plus interest. This Court made it plain in the *Mobley* case, that such cases as this your Honors left open for future decision, and that nothing that was said in the

Mobley case was to be considered as decisive, particularly in anticipatory breach and in complete repudiation cases. Thus in the *Mobley* case, this Court held (p. 638):

> Repudiation by one party, to be sufficient in any case to entitle the other to treat the contract as absolutely and finally broken and to recover damages as upon total breach, must at least amount to an unqualified refusal or declaration of inability, substantially to perform according to the terms of his obligation. *Rochm v. Horst*, 178 U. S. 1, 14, 15. *Smoot's Case*, 15 Wall. 36, 49. *Dingley v. Oler*, 117 U. S. 490, 503. *Kimel v. Missouri State Life Ins. Co.*, 71 F. (2d) 921, 923.

As there was no evidence in the *Mobley* case that the insurance company "disregarded or intended to break its promises," this Court held (p. 639):

> In view of that fact, we need not, and therefore do not, decide whether the doctrine of anticipatory breach is applicable to the class of cases to which this one belongs.

In the *Viglas* case, a similar factual situation prevailed, in that there was no showing of a breach so wilfull and material[7] as to confer upon the other party the election to treat the contract as broken, nor was there any showing of words or acts evincing an intention to refuse performance in the future. In view of that situation, this Court held (p. 681):

> We have refrained in what has been written from developing the distinction between an anticipatory breach and others. The line of division between the two has not always been preserved with consistency or

[7] Here the breach was absolute, complete and final and in every sense was wilful and material, thus conferring on petitioners the election, which was here made, to treat the contract as broken, coupled with words and acts evincing an absolute intention by respondent to refuse performance in the future of its express and conceded contract with petitioners.

> clearness. To blur it is prejudicial to accuracy of thought as well as precision of terminology. Strictly an anticipatory breach is one committed before the time has come when there is a present duty of performance. *Roehm v. Horst*, supra; Pollock on Contracts, 9th ed. p. 293; Williston, Contracts, vol. 3, sec. 1296 et seq., collecting the decisions. It is the outcome of words or acts evincing an intention to refuse performance in the future. On the other hand, there are times, as we have seen, when the breach of a present duty, though only partial in its extension, may confer upon the injured party the privilege at his election to deal with the contract as if broken altogether.

We submit, therefore, under the plain language of this Court in the *Mobley* and *Viglas* cases that the questions involved in this case arising out of respondent's total breach and absolute repudiation ab initio, in effect, of the contract here involved, are open, have not been decided, and therefore the opinion below did not give proper effect to and conflicts with the rulings in the *Mobley* and *Viglas* cases.

Further, the court below erroneously buttressed its contention that it need not consider the doctrine of anticipatory breach or complete repudiation by holding (R. 28-29):

> It is not necessary to consider the doctrine of anticipatory breach. An insurance contract is not a fixed obligation to pay money at a future date. It is a contract to give continuous insurance protection for the period covered by the premiums. In the case of a short term policy the chances are that the liability to pay money will never arise while the policy is in force. Even a life policy is not a fixed obligation to pay at some future date which is undetermined. It is a series of contingent obligations to pay if death occurs during the year covered by each successive premium. Therefore, when the defendant disclaimed liability it committed an immediate, not an anticipatory, breach of its contract to furnish insurance protection.

The holding that a policy of life insurance is a series of contingent obligations to pay, if death occurs during the year covered by an annual premium, is in direct conflict with the decisions of this Court construing the nature and character of life insurance policies. The contrary position of this Court is clearly stated in the case of *New York Life Ins. Co.* v. *Statham*, 93 U. S. 24, 30:

> We agree with the court below, that the contract is not an assurance for a single year, with a privilege of renewal from year to year by paying the annual premium, but that it is an entire contract of assurance for life, subject to discontinuance and forfeiture for non-payment of any of the stipulated premiums. Such is the form of the contract, and such is its character. It has been contended that the payment of each premium is the consideration for insurance during the next following year,—as in fire policies. But the position is untenable. It often happens that the assured pays the entire premium in advance, or in five, ten, or twenty annual instalments. Such instalments are clearly not intended as the consideration for the respective years in which they are paid; for, after they are all paid, the policy stands good for the balance of the life insured, without any further payment. Each instalment is, in fact, part consideration of the entire insurance for life. It is the same thing, where the annual premiums are spread over the whole life. The value of assurance for one year of a man's life when he is young, strong, and healthy, is manifestly not the same as when he is old and decrepit. There is no proper relation between the annual premium and the risk of assurance for the year in which it is paid. This idea of assurance from year to year is the suggestion of ingenious counsel. The annual premiums are an annuity, the present value of which is calculated to correspond with the present value of the amount assured, a reasonable percentage being added to the premiums to cover expenses and contingencies. The whole premiums are balanced against the whole insurance.

In view of the contrary holding of this Court, it was error for the court below to conclude that the absolute disclaimer of liability and wilful breach ab initio of respondent corporation was but an immediate and partial breach, as distinguished from a repudiation, because it occurred within a year covered by an annual premium. It is perfectly plain that the theory of the court below that an absolute renunciation in such a situation is immediate, partial only and is not anticipatory *or* a breach "altogether" is completely answered by the *Statham* case and by this Court's rulings in *Rochm* v. *Horst*, 178 U. S. 1, 14, 15 and *N. Y. Life Ins. Co.* v. *Viglas*, 297 U. S. 672.

On the precise point, this Court made it plain in the *Viglas* case (p. 681), that "an anticipatory breach is one committed before the time has come when there is a present duty of performance" and "it is the outcome of words or acts evincing an intention to refuse performance in the future."

As respondent in this case concededly committed a breach before the time when there was present a duty of performance and by its words and acts evinced an intention to refuse performance in the future, on the basis of a conceded contract, *and at that time further stated that it never recognized the original contract* (thus relating repudiation back to the time *each* policy issued), it follows that the breach here constitutes an anticiaptory breach, *or* such a breach as would justify an election by the injured petitioners to treat the contract as broken "altogether" and the recovery of the premiums paid by petitioners, and interest.

Moreover, as respondent by its wilful repudiation *first* breached "altogether" the conceded contract here involved, the rule announced by this Court in the case of *Central Trust Co.* v. *Chicago Auditorium*, 240 U. S. 581 is applicable. That rule is (p. 589):

> It is no longer open to question in this Court that, as a rule, where a party bound by an executory contract repudiates his obligations or disables himself from performing them before the time for performance, the promisee has the option to treat the contract as ended, so far as further performance is concerned, and maintain an action at once for the damages occasioned by such anticipatory breach.

In the *Central Trust Co.* case, this Court further held (p. 589) that the stated rule is applicable to contracts of life insurance.

Accordingly, we submit in all earnestness that the decisions below holding erroneously that petitioners' complaints should be dismissed for "failure to state a claim", do not give proper effect to and conflict with the applicable decisions of this Court. Such a situation warrants certiorari. *N. Y. Life Ins. Co.* v. *Viglas*, 297 U. S. 672, 676.

CONCLUSION

WHEREFORE, petitioners respectfully pray in this petition that this Court grant writs of certiorari and bring before this Court the decision and judgments of the United States Court of Appeals for the District of Columbia.

SETH W. RICHARDSON,
ALFONS B. LANDA,
RAYMOND C. CUSHWA,
WARREN E. MAGEE,
Attorneys for Petitioners,
Washington, D. C.

Of Counsel:
DAVIES, RICHBERG, BEEBE, BUSICK & RICHARDSON,
MAGEE, BEEDY & MCGOVERN,
Washington, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 906.

WALTER SCOTT WATSON, *Petitioner*,

v.

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY, A CORPORATION, *Respondent*.

No. 907.

KATHRYN NICOLL WATSON, *Petitioner*,

v.

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY, A CORPORATION, *Respondent*.

BRIEF IN OPPOSITION TO PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

EDWARD W. [illegible],
Woodward [illegible],
Washington, D. C.,
Attorneys for Respondent.

INDEX TO BRIEF.

Subject Index.

	Page
Statement of the Case	1
Reasons for Denying the Writs	2
I. Amounts small and no Federal or important question presented	2
II. Cases decided according to local law	3
III. Conflicts as to local law no ground for certiorari	3
IV. No jurisdiction	4
V. Judgments appealed from were correct	4
Conclusion	13

Cases Cited.

Aetna Insurance Company v. Reed, 33 Ohio State 283.	9
Armstrong v. Ross, 61 W. Va. 38, 55 S. E. 895	12
Bank of Idana v. Illinois Life Insurance Co., 135 Kan. 129, 9 P. (2) 629	7
Bank of the United States v. Daniel et al., 12 Pet. 32	9
Bingham v. United States, 296 U. S. 211	7
Burk v. Johnson, 146 Fed. 209	9
Cammack v. Lewis, 15 Wall. 643	5
Capital City Benefit Society v. Travers, 55 App. D. C. 214, 4 F. (2d) 290	3
Carter v. Love, 206 Ill. 310, 69 N. E. 85	9
Cawthon v. Perry, 76 Tex. 383, 13 S. W. 268	5
Central Bank of Washington v. Hume, 128 U. S. 195.	7
Clark v. Equitable Life Assurance Society, 133 Fed. 816	6
Connecticut Life Insurance Co. v. Schaefer, 94 U. S. 457	5
Crotty v. Union Mutual Life Insurance Company, 144 U. S. 621	7
Daley v. People's Building &c. Assoc., 178 Mass. 13, 59 N. E. 452	11

Page

Dingley v. Oler, 117 U. S. 490 11
Erie R. Co. v. Tompkins, 304 U. S. 64 3
First National Bank of Roanoke v. Terry's Adm'r., 99 Va. 194, 37 S. E. 843 5
Goldbaum v. Blum, 79 Tex. 638, 15 S. W. 564 7
Grigsby v. Russell, 222 U. S. 149 5
Hairston v. Hill, 118 Va. 339, 87 S. E. 573 8
Higgins v. Helmbold, 48 App. D. C. 50 7
Janicke v. Washington Mutual Telephone Company, 96 Kan. 309, 150 Pac. 633 9
Kauffmann v. Raeder, 108 Fed. 171 10
Kimel v. Missouri State Life Insurance Company, 71 F. (2d) 921 11
Lamborn v. Dickinson County Commissioners, 97 U. S. 181 9
Layne &c. Co. v. Western Well Works, 261 U. S. 387 .. 3
Lester v. Mayor and City Council of Baltimore, 29 Md. 415 9
Mackin v. Dwyer, 205 Mass. 472, 91 N. E. 893 9
Marye v. Parsons, 114 U. S. 325 12
McAllister v. Clement, 75 Calif. 182, 16 P. 775 12
McDonald v. Birss, 99 Mich. 329, 58 N. W. 359 5
Milliken-Tomlinson Co. v. American Sugar Refining Co., 9 F. (2) 809 8
Mobley v. New York Life Insurance Company, 295 U. S. 632 11
Moon v. Williams, 102 Fla. 214, 135 So. 555 7
Mutual Benefit Life Insurance Co. v. Swett, 222 F. 200 7
Mutual Life Insurance Co. v. Wager, 27 Barb. (N. Y.) 354 7
New York Life Insurance Company v. Kansas City National Bank, 121 Mo. App. 479, 97 S. W. 195 .. 5
New York Life Insurance Company v. Viglas, 297 U. S. 672 11
Pan American Petroleum and Transportation Co. v. United States, 273 U. S. 456 10
Peoples Life Insurance Co. v. Whiteside, 94 F. (2) 409 7
Ruhlin v. New York Life Insurance Co., 304 U. S. 202 3
Rutland Marble Co. v. Ripley, 10 Wall. 339 10
Rutter & Hendrix v. Hanover Fire Ins. Co., 138 Ala. 202, 35 So. 33 9

Page

Stewart v. Ticonic Natl. Bank, 104 Me. 578, 72 Atl. 741 9
Suburban Improvement Co. v. Scott Lumber Co., 67 F. (2) 335 11
Tate v. Commercial Building Association, 97 Va. 74, 33 S. E. 382 5
Tateum v. Ross, 150 Mass. 440, 23 N. E. 230..... 7
Taylor v. Buttrick, 165 Mass. 547, 43 N. E. 507.... 9
Thompson v. Phoenix Insurance Company, 75 Me. 55.. 9
Uppinghouse v. Mundel, 103 Ind. 238, 2 N. E. 719..... 12
Upton v. Tribilcock, 91 U. S. 45 9
Warnock v. Davis, 104 U. S. 775..... 5
Watson v. Southern Ry. Co., 104 S. C. 204, 88 S. E. 461 12
Weiss v. The District Title Insurance Co., 74 App. D. C. 126, 121 F. (2d) 900 12
Western Union Telegraph Co. v. Nester, 309 U. S. 582 12

CONSTITUTION.

Article III, sec. 2 4

STATUTE.

28 U. S. C. 41(1) 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 906.

WALTER SCOTT WATSON, *Petitioner*,

v.

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY, a Corporation, *Respondent*.

No. 907.

KENNETH NICOLL WATSON, *Petitioner*,

v.

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY, a Corporation, *Respondent*.

BRIEF IN OPPOSITION TO PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

STATEMENT OF THE CASE.

In addition to the facts stated in the "Summary Statement" contained in the petition for the writ of certiorari,

the following fact should also be taken into consideration:

The insurance policies which petitioners caused to be issued on the life of Richardson, their debtor, were so caused to be issued for the purpose of protecting the indebtedness owing by the insured to petitioners (R. 2, 10).

REASONS FOR DENYING THE WRITS.

I. The amounts involved are small and no Federal question or question of general importance is presented.

II. The case was decided in accordance with the local law of the District of Columbia.

III. Conflict among the circuits as to questions controlled by local law, is not ground for granting certiorari.

IV. This Court does not have jurisdiction to grant certiorari in these cases.

V. The judgments appealed from were correct.

I.

The Amounts Involved Are Small and No Federal Question or Question of General Importance Is Presented.

The amounts involved are $1871.10 in No. 906 and $1940.40 in No. 907. If these actions had been brought in one of the States, no Federal District Court would have had jurisdiction of them under 28 U. S. C. sec. 41(1), and they could under no conceivable circumstances have come before this Court. The cases involve neither a Federal question, nor one of general importance, being simply a controversy arising from an alleged breach of a contract relating to life insurance. There is no element in the cases which commends them for consideration by the highest Court of the land.

It is important that certiorari be not granted except in cases involving principles the settlement of which is of im-

portance to the public as distinguished from that of the parties.

Layne &c. Co. v. *Western Well Works*, 261 U. S. 387, 393.

II.

THE CASES WERE DECIDED IN ACCORDANCE WITH THE LOCAL LAW OF THE DISTRICT OF COLUMBIA.

The Court of Appeals, in holding that petitioners were not entitled to recover the premiums paid, followed the law of the District of Columbia, as enunciated by its previous decision in *Capital City Benefit Society* v. *Travers*, 55 App. D. C. 214, 4 F. (2d) 290. The argument for petitioners, based on absolute repudiation is not applicable, as there was no repudiation.

III.

CONFLICT AMONG THE CIRCUITS AS TO QUESTIONS CONTROLLED BY LOCAL LAW IS NOT GROUND FOR GRANTING CERTIORARI.

Even if it were conceded that the decision of the Court of Appeals is in conflict with decisions of Circuit Courts of Appeals, that would not be ground for granting the writs in these cases. There is no general law of the United States governing matters of contract, where no Federal statute or Federal Constitutional provision is involved. *Erie R. Co.* v. *Tompkins*, 304 U. S. 64. Conflicts among the circuits in regard to non-Federal questions are therefore no ground for granting certiorari. *Ruhlin* v. *New York Life Insurance Co.*, 304 U. S. 202, 205.

IV.

This Court Does Not Have Jurisdiction to Grant Certiorari in These Cases.

The cases do not present any question within the jurisdiction of the Federal judiciary under Article III, sec. 2 of the Constitution. The controversy does not arise under the Constitution or under any law of the United States, is not between citizens of different States, and does not fall within any of the other classes of cases enumerated in Article III, sec. 2.

V.

The Judgments Appealed From Were Correct.

1. *Claims affording grounds for relief are not stated by complaints which aver that after assignments of life-insurance policies were executed, the insurance company expressed an opinion as to the legal effect of such assignments at variance with the opinion expressed by it at the time of the issuance of the policy and the execution of the assignments, in the absence of any averment that the company has refused to perform any of its obligations under the contracts of insurance or under the assignments.*

The complaints fail to state whether the insurance was written for a term or for the life of the insured. It does not appear that the policies were in effect at the time of the expressions of opinion referred to in the complaints (R. 3, 11).

There is no allegation that the policies have matured by the death of the insured or that respondent has ever refused or stated that it would refuse to make payment in accordance with the policies and the assignments thereof, to make any loan on the policies, to pay the cash surrender value thereof, or to comply with any of the terms of the policies.

It therefore does not appear that petitioners have sustained any damage and their complaints fail to state claims upon which relief can be granted.

2. *When policies of life insurance are in fact assigned as collateral security for indebtednesses owing by the insured to the assignees, the assignees are entitled only to the amounts of their debts, with interest thereon, plus the premiums paid by the assignees.*

Even though a policy may be assigned to one who has no insurable interest in the life of the insured (*Grigsby* v. *Russell*, 222 U. S. 149), nevertheless, if, as is here the case, the assignment was in fact made as collateral security, it will be so considered even though absolute in form, and if the insurer has knowledge or notice of that fact, it does not have the right to pay to the assignee any more of the proceeds of the policy than is necessary to satisfy the debt thereby secured, with interest, plus premiums paid by the assignee.

Cammack v. *Lewis*, 15 Wall. 643.
Connecticut Life Insurance Co. v. *Schaefer*, 94 U. S. 457.
Warnock v. *Davis*, 104 U. S. 775.
First National Bank of Roanoke v. *Terry's Adm'r.*, 99 Va. 194, 37 S. E. 843.
Tate v. *Commercial Building Association*, 97 Va. 74, 33 S. E. 382.
New York Life Insurance Co. v. *Kansas City National Bank*, 121 Mo. App. 479, 97 S. W. 195.
McDonald v. *Birss*, 99 Mich. 329, 58 N. W. 359.
Cawthon v. *Perry*, 76 Tex. 383, 13 S. W. 268.

The fact that the insured was indebted to petitioners was known to respondent at the time of the issuance of the policies and the execution of the assignments. Although the assignments were absolute in form, they were intended as collateral security for the payment of Richardson's debts to petitioners (R. 2, 10). As this was the

understanding between the parties in interest the assignments of the policies did not divest the insured of his general property in the policies.

Clark v. *Equitable Life Assurance Society*, 133 Fed. 816.

The court below was not required to determine the question of the rights of petitioners under their assignments. As will appear from the cases cited, there was at least respectable authority for the position taken by respondent, and it was justified in adopting the cautious attitude of not committing itself to the theory sought to be maintained by petitioners.

3. *The rights of a creditor-assignee of a life-insurance policy are at least as great as those of a creditor-beneficiary.*

It is difficult to ascertain what is the basis of petitioners' alleged grievances. In paragraph 5 of each of their complaints (R. 2, 10) they say that respondent "represented to the plaintiff that it would issue a policy payable to the estate of William E. Richardson and accept from the said Richardson an absolute assignment thereof to plaintiff thereby making the plaintiff the sole owner of all right, title and interest in and to said policy and accomplishing the same results as would be created if the policy named plaintiff as beneficiary."

They further aver in Paragraph 11 (R. 3-4, 11-12) that they bargained with respondent for policies over which they would have absolute control because of sole ownership thereof.

It does not appear how petitioners would have become the sole owners of the policies, or how they would have had absolute control over them if they had been named as beneficiaries thereof. Certainly the beneficiary of a life insurance policy is not the owner of it and has no control over it by virtue of his designation as such, even though

such designation be irrevocable. The extent of his power is to prevent a change of beneficiary, or a surrender or pledge of the policy by the insured, unless the insured has reserved the right to do so.

Bingham v. *United States*, 296 U. S. 211, 217.
Central Bank of Washington v. *Hume*, 128 U. S. 195.
Mutual Benefit Life Insurance Co. v. *Swett*, 222 F. 200.

A beneficiary, even under an irrevocable designation, may not surrender the policy, pledge it, change any of its terms or in any manner "control" it except, if the designation is irrevocable, negatively by vetoing any change which would affect his interest in the proceeds.

An assignee of the policy has more control over the policy than has the beneficiary, and may surrender it and receive its cash value upon default in the payment of the indebtedness.

Moon v. *Williams*, 102 Fla. 214, 135 So. 555.
Bank of Idana v. *Illinois Life Insurance Co.*, 135 Kan. 129, 9 P. (2) 629.

See also *Higgins* v. *Helmbold*, 48 App. D. C. 50.

If petitioners had been designated as beneficiaries for the purpose of securing the indebtednesses owing to them, their rights would have been no greater than their rights as assignees, and would have been limited to the amount of their debts, premiums and interest.

Central Bank of Washington v. *Hume*, 128 U. S. 195, 205.
Crotty v. *Union Mutual Life Insurance Company*, 144 U. S. 621, 624.
Peoples Life Insurance Co. v. *Whiteside*, 94 F. (2) 409.
Tateum v. *Ross*, 150 Mass. 440, 23 N. E. 230.
Mutual Life Insurance Co. v. *Wager*, 27 Barb. (N. Y.) 354.
Goldbaum v. *Blum*, 79 Tex. 638, 15 S. W. 564.

It thus appears that petitioners, by virtue of the assignments of the policies, obtained not only as great, but greater rights than they would have obtained if they had been named as irrevocable beneficiaries of the policies.

The form of the documents executed to protect the creditors is of no moment. If under the law of the District of Columbia a creditor is entitled to the full proceeds of the insurance, he will receive such proceeds whether he be named as beneficiary or as absolute assignee. If under that law a creditor is entitled only to the amount of his debt with interest plus premiums, he will receive that and no more, whether he be named as beneficiary, collateral assignee or absolute assignee.

In this view it was unnecessary to the decision of these cases to determine the rights of petitioners, whether to all of the proceeds or to only so much thereof as should be sufficient to pay the debts with interest and premiums. Their rights are not affected by the circumstance of whether they were named as benficiaries or as assignees.

4. *An expression of opinion by an insurer as to the legal effect of an assignment of a policy, even if erroneous, is not ground for rescission.*

One cannot rescind a contract except for circumstances recognized as legal cause for rescission. Differences of opinion as to correct construction of a contract do not constitute ground for rescission.

Milliken-Tomlinson Co. v. *American Sugar Refining Co.*, 9 F. (2) 809, 812.
Hairston v. *Hill*, 118 Va. 339, 344, 87 S. E. 573, 575.

Even if the expression of opinion of respondent as to the applicable legal principles had been erroneous, such expression would not constitute fraud. Petitioners were equally chargeable with knowledge of the correct legal interpretation of the assignments and had no right to rely

upon the legal opinion of respondent. If they did so rely, such reliance does not invalidate the policies.

Upton v. *Tribilcock*, 91 U. S. 45.
Burk v. *Johnson*, 146 Fed. 209.
Thompson v. *Phoenix Insurance Company*, 75 Me. 55.
The Aetna Insurance Company v. *Reed*, 33 Ohio State 283.
Rutter & Hendrix v. *Hanover Fire Ins. Co.*, 138 Ala. 202, 35 So. 33.

Mistake of law is not ground for rescission.

Lamborn v. *Dickinson County Commissioners*, 97 U. S. 181, 184.
The Bank of the United States v. *Daniel, et al.*, 12 Pet. 32, 56.
Lester v. *Mayor and City Council of Baltimore*, 29 Md. 415.
Stewart v. *Ticonic Natl. Bank*, 104 Me. 578, 72 Atl. 741.
Mackin v. *Dwyer*, 205 Mass. 472, 476, 91 N. E. 893, 894.
Janicke v. *Washington Mutual Telephone Company*, 96 Kan. 309, 150 Pac. 633.
Taylor v. *Buttrick*, 165 Mass. 547, 43 N. E. 507.
Carter v. *Love*, 206 Ill. 310, 69 N. E. 85.

5. *There can be no rescission of a contract which has been partially performed by the party against whom rescission is sought, or where it is not possible to restore the status quo.*

The policies were issued in September, 1933, and continued in force for a certain length of time. This length of times does not appear as to the policy issued to Walter Scott Watson, but from the second count of the complaint of Kenneth Nicoll Watson (R. 12), it appears that the policy assigned to him was in force for about seven years. During the periods that these policies were in force petitioners had the protection of the insurance, at least to the

amount of their claims against the insured, with interest, plus the premiums paid and, if their theory is correct, to the full amount of the insurance; and respondent was under liability in respect of the insurance. Petitioners sought, by rescission, to recover the entire amount of the premiums paid, and thus to put themselves in a position where they would have had the benefit of the protection afforded by the policies, at no cost. Rescission is an equitable remedy, governed by equitable principles, and the situation sought to be created by petitioners is unconscionable and inequitable.

A party who has received and retained the benefits of a substantial part performance by the other cannot rescind.

Kauffmann v. *Raeder*, 108 F. 171.

A condition of rescission is the return of the consideration received by the party seeking to rescind.

Rutland Marble Co. v. *Ripley*, 10 Wall. 339, 355.

"That one party to an executory contract, partly executed, has violated his engagements, is generally no sufficient reason for a decree by a court of equity, at the suit of the other party, that the contract shall be annulled."

Rutland Marble Co. v. *Ripley*, 10 Wall. 339, 355.

In suits for recission of contracts the maxim that he who seeks equity must do equity is generally applied, so that the party against whom relief is sought shall be remitted to the position he occupied before the transaction complained of. Even the perpetrator of a fraud is not regarded as an outlaw.

Pan American Petroleum and Transportation Co. v. *United States*, 273 U. S. 456, 505 and cases cited.

6. *An expression of opinion by an insurer as to the legal effect of an assignment of a policy, even though erroneous, is not an anticipatory breach.*

"Repudiation by one party, to be sufficient in any case to entitle the other to treat the contract as absolutely and finally broken and to recover damages as upon total breach, must at least amount to an unqualified refusal, or declaration of inability, substantially to perform according to the terms of his obligation."

Mobley v. *New York Life Insurance Company*, 295 U. S. 632, 638.
Dingley v. *Oler*, 117 U. S. 490, 502.

Mere refusal, upon mistake or misunderstanding as to matters of fact or upon an erroneous construction of the contract does not amount to a renunciation or repudiation, particularly in the absence of bad faith.

Mobley v. *New York Life Insurance Company*, 295 U. S. 632, 638.
New York Life Insurance Co. v. *Viglas*, 297 U. S. 672, 676.
Suburban Improvement Co. v. *Scott Lumber Co.*, 67 F. (2d) 335, 337.
Daley v. *People's Building &c. Assoc.*, 178 Mass. 13, 18, 59 N. E. 452, 453.

"To amount to an anticipatory breach of a contract, the renunciation by the promisor must be clear and unequivocal, and the refusal to perform must be of the whole contract or of a covenant going to the whole consideration. * * *

"An offer to perform in accordance with the promisor's interpretation of the contract although erroneous, if made in good faith, is not such a clear and unequivocal refusal to perform as amounts to a renunciation giving rise to an anticipatory breach. * * *"

Kimel v. *Missouri State Life Insurance Company*, 71 F. (2d) 921, 923.

"If this were not the law, it would be a dangerous thing to stand upon a controverted construction of a contract. Every man would act at his peril in such cases, and be subjected to the alternative of acquiescing in the interpretation adopted by his opponent, or putting to hazard his entire interest in the contract. The courts have never imposed terms so harsh or burdens of such weight. It would amount to a virtual denial of the right to insist upon an honest, but erroneous, interpretation."

Armstrong v. *Ross,* 61 W. Va. 38, 48, 55 S. E. 895, 899, quoted with approval in *Kimel* v. *Missouri State Life Insurance Company,* 71 F. (2d) 921, 923.

Even if the assignments operated as absolute assignments as a matter of law, the authorities cited herein to the contrary effect (*ante* pp. 5-6) show that the contention of respondent was made in good faith, and, in fact, there is no claim of bad faith anywhere in the complaints.

7. *Petitioners sustained no damage.*

If petitioners' contentions as to the effect of the assignments are correct, they have sustained no damage, as the courts will enforce their rights; if petitioners are wrong, they are entitled to no relief, as they are bound by the legal consequences of their transactions; in either event, the record discloses no damage or injury to the plaintiffs.

When there is no damage there can be no recovery.

Western Union Telegraph Co. v. *Nester,* 309 U. S. 582.
Marye v. *Parsons,* 114 U. S. 325, 329.
Weiss v. *The District Title Insurance Co.,* 74 App. D. C. 126, 121 F. (2d) 900.
McAllister v. *Clement,* 75 Calif. 182, 16 P. 775.
Uppinghouse v. *Mundel,* 103 Ind. 238, 242, 2 N. E. 719, 721.
Watson v. *Southern Ry. Co.,* 104 S. C. 204, 88 S. E. 461.

CONCLUSION.

It is therefore respectfully submitted that the writs should be denied.

LEOPOLD V. FREUDBERG,
Woodward Building,
Washington, D. C.,
Attorney for Respondent.

Office - Supreme Court, U. S.
MAY 19 1944
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 906

WALTER SCOTT WATSON, *Petitioner,*

vs.

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY, a Corporation, *Respondent.*

No. 907

KENNETH NICOLL WATSON, *Petitioner,*

vs.

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY, a Corporation, *Respondent.*

REPLY BRIEF FOR PETITIONERS

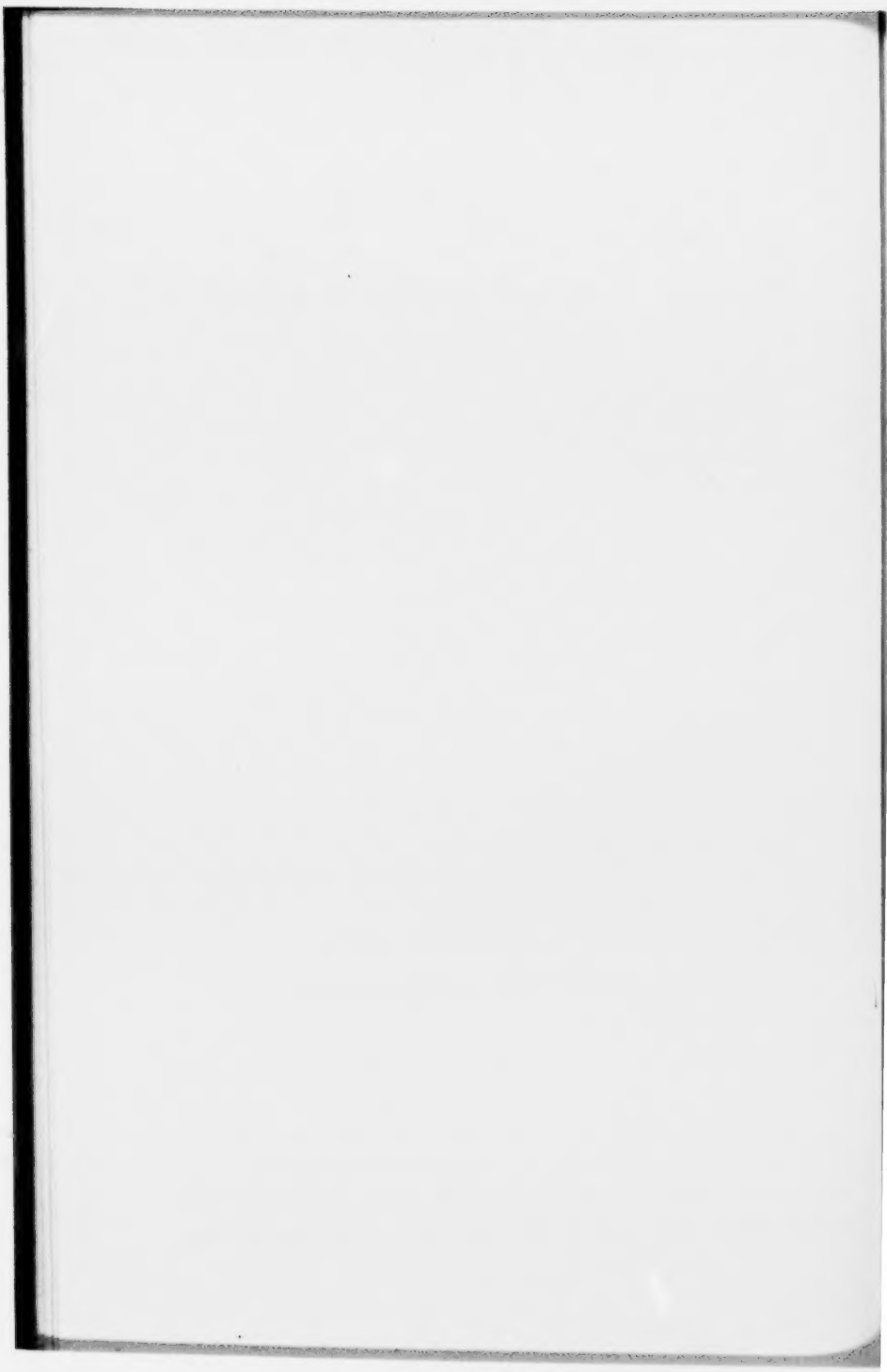
SETH W. RICHARDSON
ALFONS B. LANDA
RAYMOND C. CUSHWA
WARREN E. MAGEE
Washington, D. C.
Attorneys for Petitioners

Of Counsel:
DAVIES, RICHBERG, BEEBE,
BUSICK & RICHARDSON
MAGEE, BEEDY & MCGOVERN
Washington, D. C.

PRESS OF JUDD & DETWEILER, INC., WASHINGTON, D. C.

INDEX.

	Page
Reply brief for petitioners	1
Reply to respondent's point I	2
Reply to respondent's point II	3
Reply to respondent's point III	4
Reply to respondent's point IV	4
Reply to respondent's point V	5
Conclusion	6



In The

Supreme Court of the United States

October Term, 1943

No. 906

Walter Scott Watson, *Petitioner,*

vs.

Massachusetts Mutual Life Insurance Company,
a Corporation, *Respondent.*

No. 907

Kenneth Nicoll Watson, *Petitioner,*

vs.

Massachusetts Mutual Life Insurance Company,
a Corporation, *Respondent.*

REPLY BRIEF FOR PETITIONERS

In view of the misleading arguments of respondent we deem it our duty to reply and to point out the basic question here presented. This is *not* a case involving *a meeting of the minds* in the purchase of insurance, *followed by a breach thereafter.* That is the fundamental error into which the courts below were lead by the arguments, that the policies

were "in fact made as collateral security",[1] that respondent's repudiation was "an opinion"[2] and petitioners' cannot recover because the contract was "partially performed".

Here petitioners sought to obtain absolute ownership and control of the policies. Respondent agreed that petitioners should become the owners of the policies, *but knew* that it was not ("never") going to fulfill that agreement and would "never" recognize it. Well knowing it would not give the protection purchased, nevertheless respondent pocketed petitioners' premiums. Years later respondent divulged that it *never* intended to carry out its contract, *as it always considered the policies as collateral only.* Thus petitioners never received *what they paid for,* and when they sought the return of their premiums, respondent says "some" protection might have been received, therefore petitioners can recover nothing. But as respondent *never* furnished *the protection for which petitioners paid* respondent is not entitled to retain petitioners' premiums, and such a repudiation is complete and in no sense "a partial subsequent breach".

Under "Statement of the Case," respondent concedes the facts stated in the Petition, and merely adds that the insurance policies here involved were sought by petitioners to protect an indebtedness (Br. 1-2).

Respondent then states under "Reasons for Denying the Writs," five reasons which it contends prevent this Court from correcting the erroneous decisions of the courts below.

Reply to Respondent's Point I

First respondent corporation says that the writs should be denied because "the amounts involved are small." We

---

[1] And this argument is made in face of the conceded fact to the contrary (R. 2, 10).

[2] Concededly "at variance" with respondent's contract (Br. in Opp. p. 4), and "erroneous" (Br. in Opp. p. 8).

say this Court does not close its portals to its citizens because of their lack of financial means or because the amounts in suit are small.

We have searched the Rules of this Court in vain for a provision limiting certiorari to cases involving amounts in excess of those here involved.

Under this section of its brief, respondent boldly states the cases here involve neither a Federal question nor one of general importance, hence the writs should be denied. In view of the numerous authorities, including decisions of this Court, holding the contrary, cited in the Petition (pp. 10-23), we say this contention of respondent is without merit.

Reply to Respondent's Point II

Next, respondent argues the cases were decided in accordance with the law of the District, citing a local decision. But the very next sentence admits that contention may be unsound, because of the *inapplicability* of the cited case to a case which involves an "absolute repudiation" of an insurance policy. To avoid such inconsistency, respondent erroneously argues there was "no repudiation" here. But the conceded facts stated in the Petition show an "absolute repudiation". Thus, petitioners and respondent agreed that petitioners were to obtain absolute assignments of the policies and thereby become the owners thereof (Pet. 3-4). Thereafter, respondent repudiated that agreement and stated that it *never* recognized the original contract and *never* considered the "absolute" assignments as anything but *collateral* (Pet. 4). A more complete repudiation, one which necessarily related back to the inception of the policy, is difficult to conceive.

But this contention is basically unsound and beside the point. Subdivisions (b) and (c) of Sec. 5 of Rule 38 of this Court make "local" decisions of the court below where a

conflict exists, or where they decide questions of "general importance," or where they do not decide a "question of local importance" in accordance with the applicable law, or where they do not give proper effect to decisions of this Court, proper grounds for certiorari.

Reply to Respondent's Point III

Respondent next in substance says that a conceded conflict between the decision below with decisions in the other Circuit Courts of Appeal is not a ground for certiorari. We say such a conceded conflict on the subject of life insurance, a most important part of the trade and commerce between the States and between the States and the District of Columbia, and which relates to the good faith under which the citizen may bargain for a policy of insurance, concerns a question of general importance that ought to be settled by this Court in the public interest. In such a situation in a Federal jurisdiction we submit that the cited decisions are inapplicable.

Reply to Respondent's Point IV

Respondent states that this Court does not have jurisdiction to grant certiorari in these cases as they are not within the jurisdiction of the Federal judiciary. Respondent cites no case in support of such a contention, and we submit none can be found, as the contention is unsound. All cases arising for judicial determination in the District of Columbia arise under the Constitution and Federal laws enacted thereunder and are reviewable on certiorari by this Court.[1]

---

[1] See Art. I, Sec. 8, of the Constitution conferring exclusive jurisdiction over the District of Columbia to the United States. As all laws of the District of Columbia arise under this Section of the Constitution, it follows that all laws enacted for the District of Columbia arise under the Constitution of the United States and necessarily are within the jurisdiction of the Federal Judiciary under Article III of the Constitution.

This Court specifically recognizes in Rule 38 (c) that jurisdiction is had by certiorari over the United States Court of Appeals for the District of Columbia. If respondent's position were sound, then this Court has been for more than a hundred years exercising over cases and controversies in the District of Columbia a jurisdiction that was never possessed.

Reply to Respondent's Point V

Finally, respondent concludes by arguing that certiorari should be denied because the judgments below are correct. Such an argument is a curious method of emasculating the Rules of this Court concerning certiorari. Certiorari is not controlled by the assertion of a respondent that the decision below is "correct."

But we take issue with such a contention on the merits. Respondent's argument as set forth on pages 4 through 12 of its brief, is but a continuation and reiteration of the fallacious arguments upon which the *first* opinion below (R. 18) was erroneously based. The court below realized later that such contentions were erroneous and in its second opinion (R. 25-30) completely repudiated its first opinion which was patterned thereon. It is useless to argue a person must pay for "protection" he did not seek, did not purchase, and in fact *never* had, in view of the complete repudiation here involved. As the court below held (R. 28), respondent *has breached its contract* and the breach necessarily related back to the original understanding, showing that the minds of the parties never met. It follows, therefore, that petitioners' Complaints should not have been dismissed and petitioners should have been given "a day in court" to establish the damages sustained by reason of the respondent's known failure to deliver what the petitioners sought. Insurance companies ought not to be permitted to

collect and keep premiums paid under policies they knew were not what the buyers wanted.

CONCLUSION

We do not think the important questions concerning life insurance here involved can be "whistled down the wind" with the casual statement that they are local, unimportant and *cannot* be reviewed by this Court, and, therefore, respectfully submit that the Petition herein should be granted.

SETH W. RICHARDSON,
ALFONS B. LANDA,
RAYMOND C. CUSHWA,
WARREN E. MAGEE,
Washington, D. C.,
Attorneys for Petitioners.

Of Counsel:
DAVIES, RICHBERG, BEEBE, BUSICK & RICHARDSON,
MAGEE, BEEDY & MCGOVERN,
Washington, D. C.

Ecd.